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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re C.E., a Person Coming
Under the Juvenile Court Law.

B291545
(Los Angeles County
Super. Ct. No. DK20862A)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Daniel Zeke Zeidler, Judge. Affirmed.

Johanna R. Shargel, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Aileen Wong, Senior Deputy County Counsel, for Plaintiff and Respondent.

In this juvenile dependency case, defendant and appellant J.M. (father) challenges the juvenile court's order terminating his parental rights to his five-year-old daughter C.E. Father argues the juvenile court erred when it held the benefits C.E. would gain from her relationship with father did not outweigh the benefits of stability and permanence she would gain through adoption. We find no abuse of discretion and, therefore, affirm.

BACKGROUND

1. Events Preceding Section 300 Petition

Prior to these proceedings, father, C.E., and C.E.'s mother (mother)¹ lived together with C.E.'s paternal grandmother. When C.E. was born, mother was 17 years old and father was almost 19 years old.

In April 2016, less than one week before C.E.'s third birthday, the Los Angeles County Department of Children and Family Services (Department) received a referral stating mother neglected C.E., potentially used drugs, and often fought with father in C.E.'s presence. Upon investigation, the Department also discovered C.E. had told others that her maternal step-grandfather sexually abused her and "touches her everywhere." Further investigation revealed both parents used drugs and father also neglected C.E. For the next eight months, the

¹ Mother is not a party to this appeal. Thus, unless necessary, we do not address or recite in any detail facts related to mother's conduct.

Department continued its investigation and assessment of the family, during which time the Department provided mother and father with various resources to address the challenges they were facing. But neither took advantage of those resources. At various times during the Department's investigation, father tested positive for alcohol, marijuana, and cocaine.

2. Dependency Proceedings

Eventually, on December 27, 2016, the Department filed a Welfare and Institutions Code section 300 petition on behalf of C.E. (petition).² The petition alleged eight counts related to the parents' domestic violence, physical abuse of C.E. with a belt, and history of substance abuse. At the detention hearing held the same day, the juvenile court ordered C.E. detained and placed with paternal grandmother. The court also ordered family reunification services for mother and father, including for father monitored visits, counseling, and weekly drug testing. The court cautioned the parents that, if they did not make "substantial progress" in their court-ordered programs, eventually the court could order adoption for C.E.

The following month, the court held the adjudication and disposition hearing. The court amended the petition by striking the section 300, subdivision (a) counts, one subdivision (b) count, and otherwise editing one remaining subdivision (b) count. As amended, the petition alleged mother and father engaged in domestic violence in the presence of C.E., both had a history of substance abuse, and father physically abused C.E. by striking her with a belt. Mother and father both pleaded no contest to the amended petition, which the juvenile court sustained. The court

² Subsequent undesignated statutory references are to the Welfare and Institutions Code.

declared C.E. a dependent of the court and ordered her placed with paternal grandmother. The juvenile court-ordered continued family reunification services for father, including monitored visits, a drug and alcohol program, a domestic violence program, a parenting program, individual counseling, and weekly random drug testing.

In April 2017, the Department social worker assigned to the case reported it had been difficult to contact father. It took more than one month before father returned the social worker's calls and messages. Father and the social worker finally met on March 30, 2017. At that time, father had not appeared for drug testing since adjudication, missing all nine scheduled test dates. And although father stated he had enrolled in a parenting program, classes had not yet started. Paternal grandmother reported father visited regularly with C.E. for a few hours each Saturday and Sunday, and the visits went well.

In July 2017, the Department reported father had not enrolled in any court-ordered programs and had not been drug testing consistently. Since the Department's last report, father had missed 11 of 13 drug tests and had tested negative twice. Father stated his job prevented him from attending classes and, despite missing numerous drug tests, he claimed to be sober. Father said "he wants to enroll in programs to comply with court orders and will start consistently drug testing to show the Department that he wants his daughter back now that his life is 'back on track.'" Paternal grandmother told a Department social worker that father continued to visit C.E. on Sundays and, when his work schedule permitted, on Saturdays as well. Paternal grandmother stated father's visits were appropriate and sometimes C.E. did not want the visits to end. C.E. said she

wanted to spend more time with father. The Department reported paternal grandmother continued “to provide a safe, loving, and stable environment” for C.E. and met all of C.E.’s needs. C.E. stated she liked living with paternal grandmother. At a July 24, 2017 hearing, the juvenile court continued reunification services and ordered the Department to conduct an adoptive home study for paternal grandmother.

Finally, in January 2018, the Department reported that despite its prompting and encouragement, father still had not enrolled in any court-ordered programs. A Department social worker “reminded father that his lack of action could result in [C.E.] being adopted.” Father responded, “ ‘I know, I just don’t have time with work.’ ” Father also had missed all 23 drug tests since the Department’s last report in July 2017. The social worker indicated it was difficult to contact father. Because of father’s complete lack of progress with his case plan, the Department stated it was impossible to assess father’s ability to care for C.E. Nonetheless, father continued to have consistent and positive visits with C.E. on the weekends. And the Department reported C.E. continued to be happy and safe in paternal grandmother’s care. When the Department social worker asked C.E. about father, C.E.’s “face [lit] up and she speaks of her father with a smile on her face.” C.E. looked forward to her visits with father and asked for more time with father.

On January 22, 2018, the juvenile court found father had made “minimal” progress toward alleviating or mitigating the causes necessitating the juvenile court’s involvement. The court terminated reunification services and set the permanency planning hearing.

3. Permanency Planning Hearing

The juvenile court held the permanency planning hearing on May 21 and 22, 2018. Father was 24 years old at the time of the hearing. Prior to the hearing, the Department submitted a report with the court. The Department reported father continued to visit C.E. each week and that the visits were positive. The Department also stated C.E. remained placed with paternal grandmother, who wanted to adopt C.E. if reunification was not possible.

On the first day of the permanency planning hearing, father filed a section 388 petition, which the juvenile court denied without a hearing.³ The section 388 petition stated that on February 28, 2018 (i.e., after his reunification services had been terminated), father had enrolled in an outpatient substance abuse program, which included group and individual counseling, a parenting class, and drug testing. The section 388 petition also reported father almost was discharged from the program at the end of March, but since then had improved attendance and of his seven random drug tests, all seven were negative for “mood changing mind altering substances.” The court found the section 388 petition stated “changing and not changed circumstances” and the proposed change of order would not promote C.E.’s best interest. Father does not challenge the juvenile court’s order denying his section 388 petition.

³ Neither the section 388 petition nor the juvenile court’s ruling on it was included in the appellate record prepared for the court. Upon request, however, father’s counsel provided a copy of both documents for the court’s review.

a. Father's Testimony

Father testified at the permanency planning hearing. He stated he had "taken care of [C.E.] most all of her life, which is five years," and he was C.E.'s only father figure. He said he visited with C.E. once a week for approximately four hours at the Science Center, where he and C.E. would explore and play tag in the rose garden. Paternal grandmother monitored the visits. Father also said that since the start of this case, he spoke with C.E. on the telephone every night and spoke with paternal grandmother "all the time." In addition, father explained that approximately one month before the hearing, he started a new job close to paternal grandmother's home. He said, "I got the job because I knew I was going to be closer to [C.E.]" And since starting his new job, father had been visiting C.E. every morning before work for about 30 minutes and every afternoon after work for about one hour. He said he brought her doughnuts in the mornings and played outdoor games with her in the afternoons. Father also testified that C.E. was always happy during his visits and asked if he could stay longer or sleep over, neither of which he could do. Father said that at the end of his visits, C.E. would get upset and not want father to leave.

Father also testified he wanted to continue to be a part of C.E.'s life. He noted he had been attending parenting and substance abuse classes and had been substance free for three months. When asked how C.E. would benefit from continuing her relationship with father, father responded, "I think she will be much happier, since she doesn't have her mother in the picture. And I think she will grow up to be a normal kid, because I feel like if she doesn't see me anymore, she probably will be really sad, and she'll probably rebel. And I don't want that for my

daughter,” and, “I want my daughter by my side, because she needs a father figure. I didn’t have one, but so that’s why I want her to, so I can be next to her and make her happy.” He said, “I just want to see my daughter happy.”

Father also noted that he helped paternal grandmother “pay half of the rent” and sometimes he “stay[ed] without money” in order to help C.E.

b. Argument

Following father’s testimony, his counsel urged the court not to terminate father’s parental rights. Counsel noted both father’s consistent and positive visits with C.E., as well as C.E.’s obvious love for father and her desire to spend more time with him. In addition, counsel noted father had been in C.E.’s life since she was born. Counsel argued that if father’s parental rights were terminated, it would be to C.E.’s detriment and she would suffer emotional harm. Counsel for father requested that, at the least, the juvenile court order legal guardianship and not adoption as C.E.’s permanent plan. Counsel for mother joined in that request, stating “legal guardianship would be in [C.E.]’s best interest.”

On the other hand, C.E.’s attorney disagreed with father and mother, instead arguing the juvenile court should order adoption as C.E.’s permanent plan. Although counsel for C.E. recognized “father so clearly loves his child [C.E.] and is clearly so devoted and dedicated to her,” counsel believed father could not avoid adoption because he had not demonstrated the requisite beneficial parental relationship. C.E.’s counsel stated that, although father had maintained regular visits with C.E., he had not filled a fatherly role during those visits. Counsel believed father was more of a “friendly visitor” and his

relationship with C.E. did not outweigh the benefits C.E. would experience through the permanency of adoption. Counsel for C.E. stated, “Father, since December of 2016, has had monitored visits. He has not been in compliance with his case plan to ever get up to unmonitored or even overnights or to return. And it’s my position that having those monitored visits has prevented father from having a parental role in terms of his visitation with [C.E.]”

Counsel for the Department also asked the juvenile court to order adoption as C.E.’s permanent plan. Counsel for the Department noted father had never been in compliance with his case plan. And although C.E. had fun with father, counsel stated C.E. “also comments that she’s happy living with her grandmother, and she likes living with her.” Counsel for the Department claimed father could not overcome the preference for adoption and had not shown a beneficial parental relationship “because he hasn’t acted in a parental capacity.”

c. Juvenile Court’s Ruling

After hearing from father and counsel, the juvenile court terminated father’s and mother’s parental rights and ordered adoption as C.E.’s permanent plan. First, the court found father held a parental role and relationship in C.E.’s life, and she looked to him as a father figure. Nonetheless, the juvenile court determined the relationship between father and C.E. did not outweigh the benefits C.E. would experience through the permanency of adoption. The court found father’s “level of parental role and relationship” did not outweigh “the benefits of permanence in adoption, especially in light of [father’s] limited progress in his own issues in the last 16 months.” In closing, the court stated, “This is one of the more difficult decisions I’ve made

at a .26 hearing, and especially it weighs on me because of how young the father is,” and, “[Father] became a very young parent and just has really I think especially in the last couple months tried his best, but it’s just not enough today to show that the child doesn’t deserve to have permanence in adoption and permanence in her life for the next 14 years.”

4. Appeal

Father appealed the juvenile court’s May 22, 2018 order terminating his parental rights to C.E. and ordering adoption as her permanent plan.

DISCUSSION

Father argues the juvenile court erred when it held the beneficial parental relationship exception to adoption did not apply. As discussed below, we disagree and affirm the juvenile court’s order terminating father’s parental rights to C.E. and ordering adoption as the permanent plan.

1. Applicable Law

“At a section 366.26 hearing, the juvenile court selects and implements a permanent plan for the dependent child.” (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299 (*Noah G.*)). At that stage of the proceedings, the preferred plan for the dependent child is adoption. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 645.) “If there is clear and convincing evidence that the child will be adopted, and there has been a previous determination that reunification services should be ended, termination of parental rights at the section 366.26 hearing is relatively automatic.” (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447.)

Nonetheless, there are statutory exceptions to the preferred plan of adoption, one of which is raised here. “One exception to adoption is the beneficial parental relationship exception. This

exception is set forth in section 366.26, subdivision (c)(1)(B)(i) which states: '[T]he court shall terminate parental rights unless . . . [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.' ” (*Noah G.*, *supra*, 247 Cal.App.4th at p. 1300.) Thus, at the permanency planning hearing, the juvenile court conducts a two step inquiry. “First, the court determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. [Citations.] Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of the enumerated statutory exceptions applies.” (*In re Breanna S.*, *supra*, 8 Cal.App.5th at pp. 645–646.)

For the beneficial parental relationship exception to apply, the parent “has the burden of proving her relationship with the children would outweigh the well-being they would gain in a permanent home with an adoptive parent.” (*Noah G.*, *supra*, 247 Cal.App.4th at p. 1300.) Courts consider “[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) “A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption. [Citation.] No matter how loving and frequent the contact, and notwithstanding the existence of an ‘ “emotional bond” ’ with the child, ‘ “the parents

must show that they occupy ‘a parental role’ in the child’s life.” ’ ” (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 646; *Noah G.*, at p. 1300 [“Evidence of frequent and loving contact is not enough to establish a beneficial parental relationship. [Citations.] The mother also must show she occupies a parental role in the children’s lives”].) “Moreover ‘[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.’ ” (*In re Breanna S.*, at p. 646.)

2. Standard of Review

In reviewing challenges to the juvenile court’s decision as to the applicability of an exception to adoption, we employ the substantial evidence or abuse of discretion standard of review, depending on the nature of the challenge. (*In re J.S.* (2017) 10 Cal.App.5th 1071, 1080.) We “apply the substantial evidence standard of review to evaluate the evidentiary showing with respect to factual issues,” such as the existence of a beneficial parental relationship. (*Ibid.*) However, given the existence of a beneficial parental relationship, we review for an abuse of discretion the juvenile court’s determination as to whether termination of parental rights would be detrimental to the child as weighed against the benefits of adoption. (*Ibid.*; see *Noah G.*, *supra*, 247 Cal.App.4th at p. 1300; *In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 647.) Such decisions are “ ‘ “quintessentially discretionary.” ’ ” (*In re J.S.*, at p. 1080.) “In the dependency context, both standards call for a high degree of appellate court deference.” (*Ibid.*)

3. The juvenile court did not abuse its discretion in finding the beneficial parental relationship exception to adoption did not apply.

It is undisputed that C.E. would be adopted within a reasonable time. And the juvenile court found that a beneficial parental relationship existed between father and C.E., which finding is not challenged on appeal. Thus, the sole issue before us is whether the juvenile court abused its discretion when it found the well-being C.E. would gain through the permanency of adoption outweighed her relationship with father. As discussed below, we conclude the juvenile court did not abuse its discretion.

Despite father's love for and caring relationship with C.E., he failed to demonstrate his relationship with her outweighed the benefits of adoption. Although father consistently visited with C.E. for much of these dependency proceedings, his visits were always monitored and only for a few hours at a time. Despite Department involvement with the family for over two years and juvenile court involvement for 17 months, father failed to complete any element of his court-ordered case plan. Other than two reported "negative" drug tests during his reunification period, father either tested positive for drugs or, more commonly, simply failed to appear for drug testing. In addition, it was not until the last day of February 2018 (i.e., after the dependency case had been pending for more than one year, and just three months before the permanency planning hearing) that father finally enrolled in a program and began testing negative for substances. And even then, his commitment to the program faltered and he was almost discharged after two weeks. Finally, by the time of the permanency planning hearing, father still had not enrolled in a domestic violence program, which had been

ordered well over a year earlier. Given father's lack of consistent drug testing during the majority of these proceedings and failure to complete any court-ordered programs, it was impossible to gauge either father's ability to parent C.E. or the benefit to C.E. of maintaining a relationship with father.

In the meantime, paternal grandmother took care of C.E.'s needs and provided her with a loving and stable home. C.E. liked living with paternal grandmother, which whom she had lived for most of her life, having moved in with paternal grandmother before the Department became involved with the family. In light of this record, we conclude it was not an abuse of discretion for the juvenile court to terminate father's parental rights and order adoption as C.E.'s permanent plan.

Father argues this case is similar to *In re Jerome D.* (2000) 84 Cal.App.4th 1200 (*Jerome D.*), while the Department claims this case is more akin to *Noah G.*, *supra*, 247 Cal.App.4th 1292. We agree with the Department that this case is more factually similar to *Noah G.*, where Division Five of this district affirmed the juvenile court's order terminating the mother's parental rights. (*Noah G.*, at pp. 1294, 1304.) In that case, due to the mother's illicit drug use, her two young children were placed with their maternal grandmother, where they thrived. (*Id.* at pp. 1294, 1297.) Like father and C.E. here, the mother and children in *Noah G.* were bonded. (*Id.* at p. 1298.) The mother in *Noah G.* lived close to the maternal grandmother, consistently visited her children (at times on a daily basis), took the older child to and from school, prepared food for and fed the younger child, and performed many other parental roles. (*Id.* at pp. 1298–1299.) However, also like father here, the mother in *Noah G.* had failed to complete any of her court-ordered programs, tested

positive or failed to appear for drug testing, and her time with her children, although significant, was always monitored. (*Id.* at pp. 1296–1298.) Division Five rejected both mother’s call for legal guardianship (as opposed to adoption) as well as her argument that the juvenile court erred in focusing on her failure to complete court-ordered programs. (*Id.* at p. 1301.) The court held it was proper to focus on the mother’s failure to address the very issue that brought the children before the dependency court. (*Id.* at p. 1302.)

Similarly here, it was proper for the juvenile court to focus on father’s failure to complete his court-ordered programs and his inconsistent drug testing. Although at the time of the permanency planning hearing father recently had enrolled in a substance abuse program (undoubtedly a positive first step), he had yet to enroll in a domestic violence program. In short, father had not addressed the issues that brought C.E. before the juvenile court in the first place.

Jerome D., *supra*, 84 Cal.App.4th 1200—on which father relies—is factually distinct from the instant case and, therefore, not persuasive. In *Jerome D.*, the Court of Appeal reversed the juvenile court’s order terminating parental rights to the child Jerome. (*Id.* at pp. 1203, 1210.) When Jerome was six and a half years old, a dependency petition was filed on his behalf and he was placed with his mother’s former boyfriend and two younger half siblings.⁴ (*Id.* at pp. 1203, 1206.) Jerome was “‘the odd child out’” in the home, was sad, and expressed his desire to return to his mother’s care. (*Id.* at p. 1206.) Jerome’s caregiver had a criminal record, including domestic violence against

⁴ Father incorrectly characterizes the caregiver in *Jerome D.* as Jerome’s step-father and relative.

Jerome's mother, and was in a lengthy custody dispute with Jerome's mother over their two children, Jerome's half siblings. (*Id.* at p. 1203.) In addition, Jerome had a prosthetic eye that required specialized care, which he was not receiving in his placement. (*Id.* at p. 1205.) A psychologist opined that Jerome and his mother "shared a 'strong and well[-]developed' parent-child relationship and a 'close attachment' approaching a primary bond." (*Id.* at p. 1207.) During the pendency of the proceedings, Jerome's mother had participated in reunification services and eventually was granted unmonitored visits, including overnight visits, with Jerome. (*Id.* at pp. 1203–1204, 1207.) Given the significant factual differences between the instant case and *Jerome D.*, we find father's reliance on *Jerome D.* misplaced.

Finally, father also relies on *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*) for the proposition that father's lack of progress with his case plan is not dispositive. The Department does not address *Amber M.* In *Amber M.*, the Court of Appeal reversed the juvenile court's order terminating the mother's parental rights to her three children. (*Id.* at p. 691.) Again, that case is factually distinct from the instant case and, therefore, not persuasive. Briefly, although the mother in *Amber M.* had not satisfied her entire court-ordered case plan, she nonetheless had done "virtually all that was asked of her to regain custody," including completion of multiple programs, participation in conjoint therapy, and almost one year of sobriety. (*Id.* at pp. 685, 690.) In addition, the record in *Amber M.* included testimony from a number of professionals, including a psychologist who had conducted a bonding study and the oldest child's therapist, both of whom opined it could be detrimental to sever the parent-child relationship. The court stated, "The common theme running

through the evidence from the bonding study psychologist, the therapists, and the [court-appointed special advocate] is a beneficial parental relationship that clearly outweighs the benefit of adoption.” (*Id.* at p. 690.) Moreover, the mother’s three children were in separate placements—two children were placed with the maternal grandmother, and one child was placed with the maternal grandfather. (*Id.* at p. 685.) Had the children been adopted, they would have been split into separate groups. (*Id.* at pp. 690–691.)

Thus, although as a general proposition we agree that a parent’s failure to comply with all court-ordered reunification services is not dispositive at a permanency planning hearing, we do not agree that *Amber M.* requires a reversal in the instant case. The record before us is significantly different from that in *Amber M.* And as explained above, we find no abuse of discretion here.

DISPOSITION

The May 22, 2018 order is affirmed.
NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.